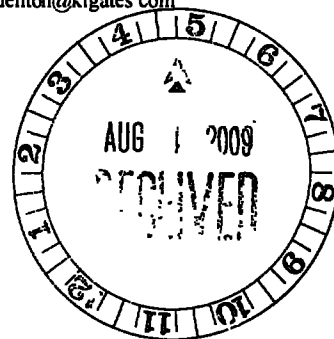


Peter W. Denton  
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August 4, 2009

**Hand Delivery**

The Honorable Anne Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423-00001



Re: STB Finance Docket No. 35239, Allegheny Valley  
Railroad Company – Petition for Declaratory Order

**ENTERED**  
**Office of Proceedings**

AUG 04 2009

**Part of**  
**Public Record**

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-captioned proceeding are the original and ten copies of **The Buncher Company's Motion to File Supplemental Evidence**.

Please time and date stamp the extra copy of the filing and return it with our messenger. If you have any questions, please contact me.

Respectfully submitted,

Peter W. Denton

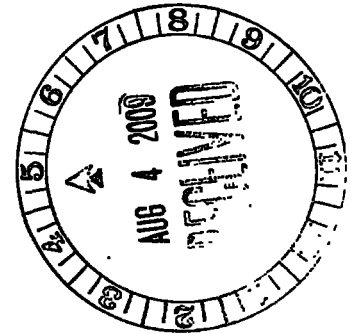
Enclosures

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35239

ALLEGHENY VALLEY RAILROAD COMPANY –  
PETITION FOR DECLARATORY ORDER



**THE BUNCHE COMPANY'S**  
**MOTION TO FILE SUPPLEMENTAL EVIDENCE**

ENTERED  
Office of Proceedings

AUG 04 2009

Part of  
Public Record

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**ATTORNEYS FOR  
THE BUNCHE COMPANY**

Dated: August 4, 2009

BEFORE THE  
SURFACE TRANSPORTATION BOARD

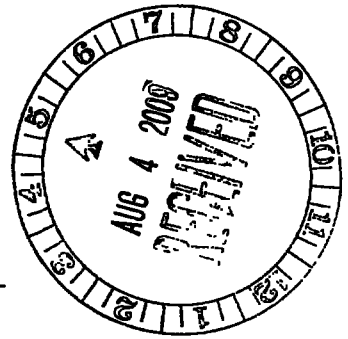
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Finance Docket No. 35239

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ALLEGHENY VALLEY RAILROAD COMPANY –  
PETITION FOR DECLARATORY ORDER

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**THE BUNCHER COMPANY'S**  
**MOTION TO FILE SUPPLEMENTAL EVIDENCE**

The Buncher Company (“Buncher”) respectfully requests that the Surface Transportation Board (the “Board”) accept the supplemental evidence filed herewith in the interest of developing a complete factual record in this proceeding. Allegheny Valley Railroad Company’s July 15, 2009 Reply (“AVRR’s Reply”) contains numerous additional track maps and detailed explanations from AVRR’s standpoint about historical railroad operations in the Strip District of Pittsburgh, PA. However, AVRR’s Reply fails to provide any direct evidentiary linkage between its theories and the specific portion of track which previously existed on the Buncher property at issue.

Buncher hereby submits as part of Exhibit A attached to the Supplemental Verified Statement of Joseph M. Jackovic (“Jackovic Supplemental V.S.”) a detailed map prepared by Consolidated Rail Corporation’s Real Estate Department which shows the exact location of that track on the Buncher property (referred to on the map as a portion of the “Valley Industrial Track” and alternatively referred to by AVRR in its pleadings as Track No. 8)<sup>1</sup> in relation to

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<sup>1</sup> For convenience, we will also refer to this track herein as Track No. 8 unless otherwise noted because the track is depicted on the Exhibit A map attached hereto immediately north of Track No. 6 and Track No. 7 (which two tracks Buncher acquired ownership of from Conrail in 1983).

numerous other Conrail tracks in the Strip District as of February 1983. The map was provided to Buncher as an attachment to its March 8, 1983 Agreement with Conrail for the purchase of the rectangular parcel of land between 16<sup>th</sup> and 21<sup>st</sup> Streets (the "Purchase Agreement" which is attached to the Jackovic Supplemental V.S. as Exhibit A). The map contains an updated cross-section from the larger V.21.3/ST-1 Pennsylvania Railroad map that is Exhibit CC to AVRR's Reply.

As noted in the attached Jackovic Supplemental V.S., the attached map, when viewed in conjunction with AVRR's Exhibit CC, shows that Track No. 8 constituted the southern edge of Produce Yard 1-B, traversed the Buncher parcel in a straight-line manner and was surrounded on both sides by concrete paving to facilitate loading and unloading of cargo between rail and truck. Track No. 8 also was several tracks removed from a separate set of tracks which extended from the Railroad Street area to the immediate north of the Fruit Auction building. Beyond the boundaries of the Buncher parcel at issue between 16<sup>th</sup> and 21<sup>st</sup> Streets, Track No. 8 (i) crossed 21<sup>st</sup> Street to the east as the second of four tracks (south to north) running parallel to Railroad Street,<sup>2</sup> and (ii) crossed 16<sup>th</sup> Street to the west as one of several tracks extending under the 16<sup>th</sup> Street Bridge into the "Team Yard for Produce Yard A" and then subsequently connecting with a series of Freight Storage Yard tracks leading to a convergence at the Ft. Wayne Bridge.

AVRR provides a detailed theory about a supposed "dual-track configuration" in the area between 16th Street and 21st Street and claims this proves there were two separate lines of

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<sup>2</sup> As is evident from the maps, AVRR's explanation of the alleged historical use of the "ex-Allegheny Branch (Railroad Street) line" and "ex-Allegheny Secondary (Smallman Street) line" is a vast oversimplification. AVRR does not establish with any specificity which particular parts of the various tracks in the area were used for the different types of service it describes. In addition, a close review of AVRR's pleadings reveals that it has provided no independent corroboration for its theory about two separate lines of railroad and fails to contradict any of the USRA Line Code or Conrail track chart evidence submitted by Buncher.

railroad in the area. AVRR dismisses as “simply irrelevant”<sup>3</sup> the fact that USRA Line Code 2229 refers only to the Allegheny Branch and makes no reference to a separate line of railroad known as the Allegheny Secondary or the Smallman Street line. AVRR also ignores the fact that it has not submitted any Conrail or Pennsylvania Railroad map or track chart which specifically depicts separate lines of railroad as parallel parts of the “Valley Industrial Track.”<sup>4</sup> However, even assuming the validity of AVRR’s theory, the map submitted as part of Exhibit A herewith, when read in conjunction with AVRR’s Reply, demonstrates that AVRR has failed to establish that Track No. 8 was a line of railroad subject to ICC abandonment jurisdiction or that Track No. 8 was part of the through route which comprised the so-called ex Allegheny Branch (Railroad Street) line of railroad described by AVRR. In fact, AVRR affirmatively states that the through route on the alleged ex-Allegheny Branch (Railroad Street) line from the 21<sup>st</sup> Street area west to the Ft. Wayne Bridge did not extend over Track No. 8, but rather over the track identified by Buncher as the “Allegheny Valley Industrial Track” and highlighted in yellow on AVRR’s Exhibit CC as the “Running Track.”<sup>5</sup>

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<sup>3</sup> Legal Argument to AVRR Reply at p. 6.

<sup>4</sup> As noted above, AVRR does not submit any evidence which contradicts the Conrail maps and track charts submitted by Buncher which are consistent with Conrail’s treatment of the various trackage in this area as a single line of railroad known as the Valley Industrial Track which portion between milepost 0.3 and milepost 0.6 was removed from Conrail’s system after the 1984 abandonment. AVRR’s Exhibit AA-9, which contains a reference to Smallman Street trackage at 21<sup>st</sup> Street located at milepost 0.71 (instead of 0.6) is inconsistent with its assertion that the tracks on Smallman Street and Railroad Street had the same milepost designations.

<sup>5</sup> See AVRR July 15 Reply, Verified Statement of Russell A. Peterson (“July 15 Peterson V.S.”) at 14. The “Allegheny Valley Industrial Track” is shown in Exhibit G to Buncher’s June 25 Response. It extended from Railroad Street through the 16<sup>th</sup> to 21<sup>st</sup> Street area in a bell-curve shape as part of the Freight Storage Yard trackage and then connected to the “Running Track” highlighted on AVRR’s Exhibit CC.

Thus, AVRR itself has provided evidence that Track No. 8 was not a line of railroad subject to the ICC's abandonment jurisdiction. Rather, the track was one of many yard and industrial tracks surrounded by concrete padding that was used to load and unload deliveries and store cars in the Produce Yards until the early 1980's.<sup>6</sup> It is well established that track used for "loading, unloading, storage, switching or other purposes that are incidental to, but not actually part of, the carriers's line-haul transportation service typically is considered to be excepted track" that is not subject to abandonment jurisdiction. See Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, Finance Docket No. 34252 (STB served Dec. 5, 2002)("Yolo County").

AVRR appears to now argue that, as a result of the Conrail transactions with Buncher and others in the early 1980's, Track No. 8 was "no longer to be used for yard and switching purposes" after 1984, but instead was allegedly preserved by Conrail as an extension of the former Allegheny Branch between 16<sup>th</sup> and 21<sup>st</sup> Street to provide for origin and delivery service to Produce Yard customers. See Legal Argument to AVRR's Reply at page 10, footnote 4 (relying on the Street V.S.). However, AVRR has provided no evidence that Track No. 8 was used for such purposes after 1984. The Street V.S. only addresses Conrail activities through 1978. Buncher has submitted evidence in prior pleadings that Track No. 8 was removed at some point in the mid-1980's after the 1984 abandonment. AVRR has not contradicted this evidence, and its various statements that the "Railroad Street" trackage was used to serve the Produce Yards area until the 1993 transaction with AVRR are misleading because they do not prove that

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<sup>6</sup> The Verified Statement of James Street ("Street V.S.") that was submitted as part of AVRR's Reply states that, between 1975 and 1978, a "third shift" Conrail local would serve the Produce Yard and other customers via Railroad Street. Mr. Street does not identify which track was used for this service, but states that all of the track facilities between 16<sup>th</sup> and 21<sup>st</sup> Street generally were referred to as the Produce Yard or 16<sup>th</sup> Street Yard. This is further confirmation that Track No. 8 was "excepted" track.

Track No. 8 was used for purposes of serving customers between 16<sup>th</sup> and 21 Street after 1984.<sup>7</sup> It is important to remember that all of the trackage in this area between 16<sup>th</sup> and 21<sup>st</sup> street on or near the Buncher property was removed in the 1980's, more than 20 years ago.

Even if the Board does determine that Track No. 8 was once a line of railroad, despite this contrary evidence and admission from AVRR, Buncher has established that the Board no longer has jurisdiction as a result of the 1984 Conrail abandonment. AVRR's Reply simply confirmed what Buncher has already recognized – that numerous tracks once existed in that general area between 16th Street and 21st Street. AVRR's Reply did not, however, disprove Buncher's evidence that certain tracks were transferred from Penn Central Transportation Company to Conrail in 1976, pursuant to the U.S. Railway Association's Final System Plan, as part of a single line of railroad identified as USRA Line Code 2229. The Purchase Agreement attached hereto as Exhibit A, the map incorporated therein, and the Deed from Conrail to Buncher all refer to Conrail's reservation of an easement on the "so-called Valley Industrial Track" between 16<sup>th</sup> and 21<sup>st</sup> Street. Conrail filed for and obtained abandonment authority for the Valley Industrial Track between 16<sup>th</sup> and 21<sup>st</sup> Street in early 1984, only months after closing the sale transaction with Buncher, thereby removing this parcel of land from the Board's jurisdiction.

In the interest of developing a complete record in this proceeding, and for purposes of clarifying the various maps and other information submitted by AVRR in its Reply, Buncher

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<sup>7</sup> Moreover, AVRR's theory about the alleged change in the regulatory status of Track No. 8 from "excepted" track to a regulated line of railroad is not consistent with precedent. There is no evidence that the alleged change in use of this track (if it occurred for a sufficient period of time) extended Conrail's system into new territory (since other tracks adjacent to the Fruit Auction building still existed as of 1984). In addition, there is no evidence that Track No. 8 was used for "continuous transportation service by through trains between different points." See Yolo County at page 3.

respectfully moves the Board to accept the supplemental evidence submitted herewith and reiterates its request that the Board issue a declaratory order confirming that it has no jurisdiction over the property owned by Buncher between 16th Street and 21st Street in Pittsburgh, PA.<sup>8</sup>

Respectfully submitted,



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**ATTORNEYS FOR  
THE BUNCHE COMPANY**

Dated: August 4, 2009

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<sup>8</sup> To the extent that the Board determines that any material facts necessary to determine this matter are still in dispute, Buncher urges the Board to hold oral hearings in this matter pursuant to 49 C.F.R. § 1112.10. AVRR has submitted a voluminous amount of information and maps in this proceeding, but based on a careful review of those submissions, Buncher does not believe that there is any independent corroboration for AVRR's position.



**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2009, I caused the foregoing **The Buncher Company's Motion to File Supplemental Evidence** to be served via first class mail, postage prepaid, on the following:

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Pittsburgh, PA 15219

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